UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 31

Henry Mayo Newhall Memorial Hospital

Employer

and Case 31-UC-295

California Nurses Association

Petitioner-Union

REGIONAL DIRECTOR'S DECISION AND ORDER
CLARIFYING BARGAINING UNIT

Upon a petition duly filed under §9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, herein the Board.

Pursuant to the provisions of §3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1). The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[1]/

2). The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. [2]/

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[1]/ The Petitioner filed a Motion to Correct Transcript in which it seeks to make approximately 95 corrections to the transcript. In the absence of any opposition to this Motion, I grant the Petitioner's Motion to Correct Transcript, except for the following two modifications: the correction Petitioner seeks to page 214, line 23, actually should refer to, and will be corrected at page 241, line 23, and the correction Petitioner seeks to page 478, lines 7-8, actually should refer to, and will be corrected at page 479, lines 7-8.

[2]/ The Employer, Henry Mayo Newhall Memorial Hospital, is a corporation engaged in the operation of an acute care hospital in Valencia, , California. During the past fiscal or calendar year, the Employer derived gross revenues in excess of $250,000. During this same period of time, the Employer purchased goods valued in excess of $50,000 directly from enterprises located outside the State of California. Thus, the Employer satisfies the statutory jurisdictional requirement as well as the Board's

3). The Petitioner ("the Union") proposes to clarify the bargaining unit to include the job classification of "RN IV". On August 24 1999, the Union was certified as the representative of a unit of registered nurses ("RN(s)") employed by the Employer at its facilities located at 23845, 25727 and 25751 McBean Parkway, Valencia, California. The Union first filed a representation petition in this matter on June 7, 1999 (Case 31-RC-7744), which it withdrew and re-filed on or about July 2, 1999 (Case 31-RC-7753). At the time that the parties entered into the Stipulated Election Agreement, the parties also executed a "side letter," whereby they agreed to disagree over the supervisory status of the RNs IV employed by the Employer. The Employer took the position that the RNs IV were statutory supervisory employees and the Union took the position that they were not supervisors and should be included in the Unit. Although the RNs IV voted under challenge in the representation election, the challenges to their votes were not determinative and the issue of their supervisory status has not yet been resolved. Therefore, the Union has filed this unit clarification petition, seeking to clarify the unit to include the RNs IV.

The Employer's Chief Operating Office/Chief Nurse Executive/Director of Nursing (referred to herein as the "Director of Nursing"), Ms. Van Wert, oversees the nursing department. The nursing department includes RNs, licensed practical nurses ("LPNs"), and certified nursing assistants ("CNAs"). There are five nursing department directors, who report to the director of nursing. The nursing directors have 24-hour responsibility. The five nursing directors are responsible for the following five multi-unit departments: 1) critical care services, which includes intensive care unit ("ICU"), definitive observation unit ("DOU"), and the emergency room; 2) medical surgical services ("med/surg") and behavioral health unit ("BHU"); 3) sub-acute services, which includes a transitional care unit ("TCU"), a rehabilitation unit and all therapy units; 4) women's services (including labor and delivery, post partum, and the nursery), the nursing office and the float pool; and 5) peri-op services (including inpatient operating room and recovery room, gastro-intestinal lab/special procedures, ambulatory surgery center and recovery, and pain management). There is always a department director or house supervisor on the premises.

There are approximately 230 RNs, each of whom is classified as RN I, RN II, RN III, or RN IV. There are 28 RNs IV. For a period of time from about 1995 through mid-1997, the position of RN IV was eliminated and, in its place, there was a position called patient care coordinator. Until recently, there also had been a classification of RN

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discretionary standard for asserting jurisdiction herein. *Butte Medical Properties d/b/a Medical Center Hospital*, 168 NLRB 266 (l967).

V/assistant director. In the side letter to the Stipulated Election Agreement in this case dated June 18, 1999, the parties agreed that two individuals classified as RN V/assistant directors in surgical services were excluded from the unit as supervisors. According to the director of nursing, there no longer will be a position of RN V/assistant director. One of the two remaining assistant directors stopped working for the Employer within a month of the commencement of the hearing in this matter[3]/ and the other assistant director is on leave. Although the director of nursing testified that she intends to eliminate the position of assistant director, apparently it still existed at the time of the hearing.

The RNs IV are paid hourly and receive the same benefits as the other RNs who are in the bargaining unit. In March 1999, the Employer issued a memo announcing training concerning the union organizing activity. In that memo, the Employer explained who was considered to be a supervisor and stated that "staff who are responsible for leading a team but work… primarily in staff roles (i.e. RNs IV…)" are not considered to be supervisors. In late March 1999, when asked at a meeting whether RNs IV would be considered to be supervisors, the director of nursing answered that she would research the issue. At the hearing in this matter, the director of nursing testified that the RNs IV are considered to be front line supervisors and part of management.

The position description for the position of RN IV states that the RN IV, "in collaboration with the Department Director…completes performance appraisals for employees assigned to that shift, documenting and coaching/counseling, schedules staff and monitors the financial impact of staffing…" The RNs IV are evaluated with respect to certain "competencies." The competencies for the RN IV position include, supervision of RNs, LVNs, CNAs, patient care technicians and other personnel assigned to the nursing care team; participation in the selection of staff for the nursing care team; contribution to the performance appraisal process for those assigned staff members by assessing clinical performance and assisting with the orientation and competency of staff; and serving as a resource for staff. Since March of 1999, the director of nursing has held monthly meetings with the RNs IV. Actually, not all of the RNs IV attend the monthly meetings. Sometimes, just one of the RN IVs in a particular department will attend. According to the director of nursing, the purpose of these meetings is to assist the RNs IV in problem solving and to train them in leadership skills.

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[3]/ The Hearing began on April 11, 2000.

Section 2(11) of the Act defines a statutory supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The criteria listed in Section 2(11) are to be read in the disjunctive so that the exercise of any one of the indicia listed in Section 2(11) may warrant a finding of supervisory status; however, Section 2(11) also contains the "conjunctive requirement that the power be exercised with 'independent judgment,' rather than in a 'routine' or 'clerical' fashion." Chevron U.S.A., 309 NLRB 59, 61 (l992).

The Board is careful not to construe supervisory status too broadly because employees deemed to be supervisors are denied the rights granted to employees in the National Labor Relations Act. Washington Nursing Home, 321 NLRB 366, 377-378 (1996). Therefore, the Board holds that the party attempting to exclude individuals from a bargaining unit by alleging that they are statutory supervisors has the burden of establishing that they are supervisors within the meaning of Section 2(11) of the Act. Ohio Masonic Home, 295 NLRB 390, 393 (l989); Golden Fan Inn, 28l NLRB 226, 230 at fn.24 (1986); Tuscon Gas & Electric Co., 241 NLRB 181 (l979). In this regard, the Board has held that "whenever the evidence is in conflict or inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least not on the basis of those indicia." Phelps Community Medical Center, 295 NLRB 486, 490 (1989). Furthermore, conclusionary statements without supporting evidence are not sufficient to establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193-194, 197 (1991).

As the Employer's director of nursing testified, and as is evident from the record, not all of the RNs IV employed by the Employer exercise the same level of independence. The director of nursing testified that it is the Employer's "eventual" goal that all RNs IV will act independently with respect to performance appraisals, hiring and disciplinary actions. As she stated, some of the RNs IV are performing in this manner, but others have not yet reached that level of independence. The responsibilities of the RNs IV varies from unit to unit. Indeed, the director of nursing concedes that not all RNs IV have

the same level of responsibilities. The different directors are free to organize their units differently and, therefore, there is a discrepancy in how RNs IV are utilized in different units. The director of nursing indicated that she does not know how the different directors use the RNs IV on a day-to-day basis. The difficulty in evaluating the authority of the RNs IV in the different departments is complicated by the many recent changes in the identity of the directors of several departments. For example, there were three different directors for the transitional care unit during the period July 1999 through the time of the hearing and the duties of the RNs IV varied from director to director. Also, there were new directors for the peri-op services and the critical care units within a few weeks before the hearing in this matter commenced.

In light of the differences in the authorities possessed and exercised by RNs IV in the different departments, it is necessary to evaluate the differing duties and authority of the RNs IV in different departments.[4]/ I note that some of the witnesses who testified for the Petitioner are former employees who do not have direct knowledge of the situation as it currently exists. However, I also note that in most instances the Employer did not call witnesses to refute their testimony or to establish that the situation has changed.[5]/

After reviewing the record evidence with respect to each of the statutory indicia of supervisory status, I conclude that the Employer has failed to meet its burden of establishing that the RNs IV, as a group, are supervisors within the meaning of Section 2(11) of the Act.[6]/ I am aware that it is the possession of supervisory authority, rather than the frequency of its exercise, that determines supervisory status. Chevron U.S.A., supra at 61. However, it is the Employer's burden to establish that the RNs IV should be

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[4]/ The Union asserts that since the initial underlying RC Petition was filed on June 9, 1999, the facts concerning the supervisory authorities of RNs IV should be evaluated as of that date. I disagree and find that, in this non-adversarial, fact-finding proceeding, all facts should be considered. The Union's attorney prefaced many of her questions with the reference to the period of time ending June 9, 1999. Where there is evidence concerning post-June 9, 1999 authority and duties of RNs IV, I consider such evidence to be relevant. However, where there is unrebutted evidence concerning duties and authority as they existed prior to June 9,1999, and there is no evidence that the duties and authorities have changed, I assume that the facts remain the same.

[5]/ For example, the former director of the women's unit testified that she reviewed performance evaluations completed by RNs IV and made changes to them. The Employer did not call any witness to establish that the current director of the women's unit no longer follows this practice.

[6]/ Notwithstanding the failure of the record to establish that the RNs IV, as a group, are supervisors within the meaning of the Act, the record does contain sufficient specific evidence to establish that, for the reasons described below, two of the RNs IV, Debbie Rheinfurth and Lorna Adelini, are supervisors within the meaning of the Act.

excluded from the unit as supervisors and the Employer can not meet this burden with mere conclusionary assertions, which are unsupported by specific evidence. Riverchase Health Care Center, 304 NLRB 861, 865 fn.9 (1991). As the Board stated in Sears, Roebuck & Co., supra at 193, "[C]onclusionary statements made by witnesses in their testimony, without supporting evidence, does not establish supervisory authority." The Board has noted that the possession of "…theoretical authority which is not actually exercised, is insufficient to establish that one is a statutory supervisor." Washington Nursing Home, 321 NLRB 366, 381 (1996). It is the actual authority, responsibility and relationship to management that is determinative of supervisory status. Chevron U.S.A., supra at 61.

In Beverly Enterprises-Massachusetts, Inc. v. NLRB, 165 F.3d 960, 963 (D.C. Cir. 1999), the Circuit Court for the District of Columbia recently addressed the difficulty in determining supervisory status when a worker has not exercised purported supervisory authority. The Circuit Court noted that in some cases, the finding of supervisory status might be warranted despite the lack of exercise of supervisory authority. The Court cautioned, however, that in the absence of exercise of purported supervisory authority, there must be other affirmative indications of the existence of the authority.

The record herein fails to establish that the RNs IV in any of the departments have the authority to suspend, lay off, recall, promote, or discharge employees or effectively to recommend these actions. The evidence concerning the authority possessed by RNs IV in the different departments in connection with hiring, transferring, assigning, rewarding, disciplining and directing employees reveals the divergence of authority possessed and exercised by the different RNs IV.

HIRING

The Director of Nursing testified that the RNs IV have the authority to hire. As she concedes, however, since not all of the RNs IV have the same experience or competence, not all of the RNs IV exercise the authority to hire independently. The Employer only provided specific evidence concerning the hiring authority of Debbie Rheinfurth (an RN IV in the behavioral health unit ("BHU")), Lorna Adelini (an RN IV in the GI/Special Procedures Lab) and Joni Gallette (an RN IV in the med/surg unit).

Brenda Hay is the director of the med/surg and behavioral health units. There are ten RNs IV in these units. Ms. Hay testified that these RNs IV conduct most of the interviews and have the responsibility of deciding whether or not to hire an applicant. Ms. Hays testified that the RNs IV do consult with her about the decision and she exer-

cises judgment when reviewing a recommendation from an RN IV concerning hiring. However, she has never overruled a recommendation by an RN IV to hire somebody.

Debbie Rheinfurth, an RN IV in the behavioral health unit, an area over which Ms. Hay is the director, testified that she has hired between nine and ten employees since she became an RN IV in May 1999. She conducted the interviews and made the decision whether to hire the applicants. The job offers were contingent upon the passing of a physical examination, a drug test and a background check conducted by the human resources department.[7]/

On the other hand, Joni Galletti, an RN who has been employed since July 1994 as an RN IV in the med/surg unit, another unit over which Ms. Hay is the director, testified that through June 7, 1999, she had never been involved in interviewing any applicant and had never even expressed an opinion as to whether an applicant should be hired. More recently, this RN IV did participate in at least one interview by sitting in with the director during the interview and expressing her opinion to the director. However, the director independently reviewed the employment applications and interviewed the applicants and, according to Ms. Galletti, it was the director who made the decision whether to hire the applicant. Thus, although this RN IV recently may have participated in the hiring process, the record fails to establish that she hired any employee or effectively recommended that an employee be hired.

An RN IV in the Gastro-Intestinal Procedure Lab ("GI Lab"), Lorna Adelini, testified that she has been involved in the hiring of about four employees during the last two years. After receiving an authorization to hire, Ms. Adelini places job advertisements, listing her name and phone number as the contact person. She screens applicants over the telephone and schedules in-person interviews. Ms. Adelini testified that it is her decision who to hire and that she obtains the approval of the director only after she selects the new hire. The director does not participate in the interview process and has never disagreed with her decision about who to hire.[8]/ There is no evidence concerning

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[7]/ The evidence is sufficient to establish that Debbie Rheinfurth possesses the authority to hire employees, or at least to effectively recommend the hiring of employees, within the meaning of Section 2(11) of the Act. Therefore, Ms. Rheinfurth is excluded from the unit as a statutory supervisor.

[8]/ An RN II, who was interviewed by Ms. Adelini in early 1996, testified that after she was interviewed by Ms. Adelini, she was taken to speak to the director or assistant director of surgical services, who also interviewed her and discussed salary with her. It was he who offered her the position. Since this relates to a period of time four years ago, I do not find this testimony to be inconsistent with the testimony of Ms. Adelini concerning the more current practice.

the involvement in the hiring process of any of the other RNs IV who work in any of the other peri-op services units.

An RN IV in the emergency room testified that she has never attended any interview with any job applicant. Her involvement in the hiring process consists of the director introducing her to the applicant and, perhaps, asking her opinion of the applicant's personality. An employee who was an RN IV in the ICU from June 1998 through September 1999 testified that although he was asked by the director to meet with prospective employees on four occasions after they were interviewed by the director, his recommendation was only followed about half of the time. When he met with these applicants, he did so only to assess whether their personalities would fit in with the unit. He did not discuss their qualifications or previous employment. He testified about an instance when he specifically recommended that the Employer not hire an applicant and the director nevertheless did offer that applicant a position. Similarly, another RN IV who worked in the ICU from mid-summer 1997 until recently testified that she had no involvement in the hiring process as an RN IV. There is no evidence that any of the RNs IV in the critical care unit, have had any more significant involvement in the hiring process than that described by these witnesses.

With respect to the women's unit, an RN II, who was the director of that unit for the period from August 1997 through May 1998, testified that when she was the director she did all of the interviewing and hiring for her department. More importantly, she also testified that through June 1999, the department director, Laura Bauer, conducted interviews with applicants and hired the new employees. The Employer did not introduce any evidence establishing that RNs IV in the women's services unit have hired or effectively hired employees.

An employee who was employed as an RN IV in the transitional care unit from February 1999 through March 2000, testified that she had no involvement in hiring or interviewing during that period of time. Again, there is no specific evidence concerning the participation of any RN IV in the hiring of any employee, or in the effective recommendation concerning the hiring of any employee, in the transitional care unit, rehabilitation unit, or the various therapy units.

I conclude that there is sufficient evidence to establish that Lorna Adelini hires employees, or at least effectively recommends the hiring of employees within the meaning of Section 2(11) of the Act and, therefore, she is excluded from the unit as a statutory supervisor.

Although the specific record evidence concerning Ms. Rheinford and Ms. Adelini establishes that they possess the authority to hire employees within the meaning of Section 2(11) of the Act, I am unable to conclude that the Employer met its burden of establishing that the RNs IV in general possess this authority. In this regard, I particularly note the lack of specific evidence to establish that any of the other RNs IV possess the supervisory authority to hire or to effectively recommend the hire of employees and I further note the record evidence to the contrary.

DISCIPLINE

The employer asserts that it has a progressive discipline system, which includes verbal warnings, a "contact" or "education" record, and written warnings. A contact record or an education record is a written document that describes the problem issue and the corrective action to be taken.[9]/ Contact records are referred to as "interim personnel reports" in one of the Employer's policies. The Employer's policy concerning formal and informal warnings describes verbal warnings as being informal and advisory in nature. They can not be the basis for formal disciplinary action by themselves. There does not appear to be a limit on the number of verbal warnings, contact warnings, or education records that an employee can receive before receiving more serious discipline.

The Employer's disciplinary policy describes written warnings as being either informal or formal. All written warnings are placed in the employees' personnel files. Formal warnings remain in effect for one year and constitute a basis for disciplinary action within that period. Formal warnings are given as first, second or final. The vice-president of human resources reviews all formal written warnings before they are given to the employee and he is involved in the decision as to the appropriate level formal warning to be given.

The record reveals that RNs IV can give verbal warnings and contact or education records without first receiving approval from the director. Even so, some RNs IV do consult with their director before even giving a verbal warning or contact record. RNs who are not RNs IV also can fill out contact records concerning their co-workers.

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[9]/ The witnesses were confused as to the significance of a contact record and/or an education record. One RN IV testified that an education record is the new term for contact record, designed to make it seem less punitive. One of the directors testified that it was her belief that education records were less severe than contact records. And one of the RNs IV testified, in response to leading questions on cross examination, that the order of discipline from the lowest level to the most severe was verbal warning, written warning, contact record and then termination. She believes that the contact record is the end part of the disciplinary progression and is in the hands of the director.

The Board finds that the issuance of verbal reprimands, without more, is too minor a disciplinary function to render an employee a statutory supervisor. Passavant Health Center, 284 NLRB 887, 889 (1987). In giving contact or education records the RNs IV are merely filling a reportorial function. The record fails to establish that these actions could automatically lead to any further discipline against an employee. Since these verbal warnings and contact or education records, without more, do not affect job tenure or status, they do not establish supervisory authority. Washington Nursing Home, 321 NLRB 366 fn.4 (1996); Riverchase Health Care Center, 304 NLRB 861, 865 (1991).

The record fails to establish that RNs IV have the authority to issue more serious discipline or effectively to recommend more serious discipline. The record does not contain any documentary evidence of written warnings issued by any RN IV.

With respect to the units overseen by Brenda Hays (med/surg and BHU), Ms. Hays testified that RNs IV have the authority to determine whether discipline is warranted and whether the discipline should be a verbal or written warning. Although RNs IV often consult with her about discipline, they do not always do so. An RN IV from the behavioral health unit testified that although she gives verbal counselings and contact records without consulting the director, she would consult with the director if she felt a written warning was warranted. Furthermore, her recommendations with respect to discipline are not always followed. There was one incident where she recommended that the director issue a final written warning and possible suspension or probation, but the director decided to terminate the employee rather than to give the recommended warning.

An RN IV in the med/surg unit testified that through June 7, 1999, she never had completed a formal written warning notice for an employee and had never recommended that an employee receive a formal written warning or any more serious discipline. Moreover, she testified about an occasion when the director disregarded her recommendation concerning the appropriate discipline for an employee.

With respect to the peri-op services unit, an RN IV in the gastro-intestinal special procedures lab testified that although she gives verbal and written education reports to employees, she consults with her director concerning more formal discipline. She discusses the type of discipline with her director. According to this RN IV, contact records are not just for disciplinary matters, they also can relate to good performance. Furthermore, it is her understanding that co-workers can complete contact records for each other.

An RN II in the women's unit testified that during the period of time that she was an assistant director or director of that unit, from June 1994 through May 1998, the RNs IV did not have authority to issue written warning notices without approval from the director. It is her understanding that currently RNs IV still can not issue written warnings without director approval. Currently, the department director has 24-hour accountability so that either the department director or the house supervisor would be notified of any serious incident. The record does not reveal any change in this practice.

An employee who was an RN IV in ICU during the period June 1998 through September 1999 testified that he gave verbal "educations" not verbal "counselings" and that he always showed contact records to his director before giving them to the employee. Another two RNs IV from ICU testified that although they did give verbal warnings, they always obtained the director's agreement before doing so. One of these RNs IV was employed as an RN IV in ICU until recently and the other was last employed as an RN IV in ICU in July 1999. An RN IV in the emergency room testified that she has never filled out a written warning notice. During a meeting last year, a question came up about final written warnings and the director said that those are significant and only the director should issue them.

An employee who was employed as an RN IV in the transitional care unit ("TCU") from February 1999 through March 2000, testified that although she did give verbal warnings or counselings to employees, she consulted with her director on each occasion. She never gave a contact record, written warning or any more serious discipline. Although she has recommended a written warning for absenteeism, that was merely a reporting of a violation of the set absenteeism policy.

The record does not contain any specific evidence that the issuance of verbal warnings, contact records or education records by RNs IV affect the wages, tenure or other conditions of employment of employees. Further, there is insufficient evidence to establish that the RNs IV have the authority to issue written warnings which would, without more, independently result in adverse actions. Nor is there sufficient evidence to establish that they have the authority to effectively recommend the issuance of such written warnings. Therefore, I conclude that there is insufficient evidence to establish that the minor participation of the RNs IV in the discipline process renders them to be supervisors under the meaning of the Act. Green Acres Country Care Center, 327 NLRB No. 57 (November 30, 1998); Ten Broeck Commons, 320 NLRB 806, 812 (1996); Washington Nursing Home, 321 NLRB 366, fn. 4 and 379-380 (1996).

REWARD

The statutory definition of a supervisor does not include the action of evaluating others as a separate indicia of supervisory authority. Therefore, when an evaluation by itself does not affect wages and/or job tenure, the individual performing the evaluation will not be found to be a supervisor. Elmhurst Extended Care Facilities, 329 NLRB No. 55, slip op. at 2 (September 30, 1999). However, the Board will find that individuals who independently perform evaluations of other employees, which lead directly to personnel actions affecting those employees, such as merit pay increases, are statutory supervisors. Ten Broeck Commons, supra 813. By making such evaluations, the individual has the authority to reward others.

The Employer asserts that the RNs IV evaluate employees and that those evaluations directly determine the amount of merit pay increase received by the employees. The RN IV position description provides that "In collaboration with the Department Director, the RN IV completes Performance Appraisals for employees assigned to that shift." The competency checklist section of the RN IV position description references that the RN IV "contributes to the performance appraisal process."

The employees of the Employer receive annual evaluations, which are completed by RNs IV. The evaluation forms include a section that lists numerous job-specific competencies. Next to each competency, there are columns for categories from one to four, and a column for a "not applicable" designation. Similarly, there is a section that lists core competencies and again has places for the entry of a check mark under ratings from one to four. At the bottom of each of the competency lists is a place for the average rating to be noted. At the end of the evaluation, there is a space for the employee to write comments and a place for the evaluator to write a summary of the employee's performance and a place to write an employee development plan. There are spaces for the evaluations to be signed by the employee, the supervisor, the director, and a representative of the human resources department. In completing the evaluations, the RNs IV sometimes ask for input from other nurses about the employees being evaluated. For example, in the women's department, the RNs IV distribute forms to other nurses to obtain their input concerning the employee being evaluated. In at least some of the departments, the RNs III, who are in the bargaining unit, complete the 90-day evaluations that are completed for new employees using similar evaluation forms.

The Employer has a merit pay system. Each year, the human resource department determines the percentage pay increase that will be awarded for employees receiving total evaluation ratings in different ranges. Attached to each performance

evaluation is a personnel action request ("PAR"), which reflects the average of the ratings for job specific competencies and the core competencies. It is this "PA rating" that determines the amount of increase to be received by the employee. For example, in fiscal year 1998/1999, employees receiving overall ratings in the highest range were to receive a pay increase of 4% and in fiscal year 1999/2000 employees receiving an overall rating in the highest range are to receive a 3% increase. The Employer argues that since the amount of merit increase received by employees is linked to the evaluation rating they receive, the RNs IV, exercise supervisory authority when they complete the evaluations.

The record contains a document (Petitioner's Exhihit 32) for the fiscal year starting 10/1/99 setting forth the prescribed pay increase for the numerical ratings ranges. As the Petitioner points out in its brief, the record contains examples of employees who received percentage increases that are different than the increase prescribed by that document.[10]/

During the period 1994 through 1998, the performance rating had no effect on earnings because there was no merit raise system in effect at that time. Even now that the merit pay system is in effect, employees who are at the top of their pay scale ("maxed out") or who are already earning a rate in excess of the maximum rate do not receive pay increases.

Although it is the RNs IV who complete the evaluations, the record reveals that, to differing degrees, the department directors are involved in the process. Generally, the directors sign the "PAR" form that is attached to the evaluation. Ms. Hay testified that RNs IV bring evaluations to her after they are completed and, sometimes, they ask for her input or advice while they are in the process of preparing the evaluation. Of the approximately 140 evaluations completed in the units Ms. Hays oversees, she has input into about 20 or 30 of the evaluations. In reviewing the evaluations, if she feels that something needs to be added, she makes a "strong suggestion" that the RN IV make

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[10]/ According to the relevant merit increase scale (Petitioner's Exhibit 32), the percentage merit increase for appraisal scores of 3.6-4.0 is 3% and the merit increase for appraisal scores of 3.5 to 3.0 is 2.5%. Although the record contains evidence that some employees with appraisal scores in that 3.6-4.0 range did receive a 3% increase, an exhibit in evidence reveals an employee who received an appraisal score of 3.6 and yet received a 4% raise, rather than the mandated 3% raise. Similarly, the record reveals employees who received the mandated 2.5% increase for their appraisal ratings in the range from 3.0 to 3.5 and, yet, others with appraisal ratings in that same range received a 3% increase. In addition, the record contains other examples of employees who did not receive the amount of increase prescribed by the schedule. I also note that an evaluation introduced into evidence by the Employer, shows that the average rating by the RN IV for job specific competencies was 3.9 and the average rating for core competencies was 3.7. Although the director testified that those two ratings are averaged to obtain the overall performance appraisal rating, in this case the employee received an overall rating of 3.99.

the change. An RN IV in the med/surg unit testified that she completes her evaluations in pencil so that the director can make changes if she so desires. With respect to a particular employee, last year the department director instructed an RN IV precisely what to mark on the employee's evaluation and this year the director directed the RN IV to complete the evaluation the same as she had last year. An RN IV in the behavioral health unit testified that she consulted with her director, Ms. Hay, about an evaluation that contained such a low rating that the employee would not qualify for any merit increase.

A former director of the med/surg unit, who was the director from June 1997 through June 1998, testified that while he was the director, he reviewed every performance evaluation completed by RNs IV before they were given to the employees. Moreover, he has made changes on those evaluations and has given evaluations back to RNs IV with instructions concerning changes he wanted them to make. Other RNs IV testified that they have noticed changes on evaluations completed by them and that they have been directed to make particular changes.

With respect to the critical care unit, an employee who was an RN IV in the ICU during the period June 1998 through September 1999 testified that he always gave his performance evaluations to his director, who sometimes returned the performance evaluations to him with suggested changes. He has been asked to elaborate on the summary statement or to increase the stated goals for the employees. In addition, he has been asked to re-evaluate and/or change check mark ratings. He testified about one specific instance in which he was asked to lower the rating for an employee. On about two to five occasions the director gave him specific language to use in evaluations. Another employee, who was an RN IV in ICU during the period mid-1997 until shortly before the hearing in this matter, testified that the department director has made changes to performance evaluations that she has completed. Similarly, an RN IV in the emergency room testified that she gives the completed performance evaluations to the department director, who reviews the evaluations and regularly makes additions to them. Also, the director has instructed the RN IV to add additional comments and on one occasion the director actually changed a numerical rating.

A nurse who was an RN IV in the definitive observation unit through about July 1999, testified that the then director once told her that the numerical rating for a particular employee should have been higher. When asked by the RN IV why she had not received the evaluation back to make the changes, the director told the RN IV that it had been taken care of.

The former director of the woman's unit, who was the director from 1997 through May 1998, testified that when she was the director, she reviewed the evaluations completed by the RNs IV and made corrections or changes when necessary. She made such changes on about 10% of the evaluations. In her unit, if the employee and the RN IV disagreed over a rating, she, as the director, made the final determination about the appropriate rating.

The Employer asserts that the RNs IV exercise supervisory authority in evaluating employees because they rate the employees and the average rating determines the amount of pay increase the employee will receive. Although this argument has its appeal, an examination of the record reveals that directors review the evaluations and sometimes make changes to them. The Employer did not proffer witnesses to refute the testimony of the Union witnesses about these reviews and changes. See, Harborside Healthcare, 330 NLRB No. 191 (April 24, 2000), in which the Board found that the certified nurses were not supervisors, noting that managers can and have returned evaluations prepared by the certified nurses to them for revisions. See also, Hillhaven Rehabilitation Center, 325 NLRB 202, 203 (1997), in which the Board found that an individual's role in the evaluation of employees did not qualify her as a supervisor where the director of nursing altered the figures on several evaluations.

Moreover, the record reveals inconsistent application of the pre-determined amount of merit increase to the rating ranges. See, Hillhaven, supra at 203, (Board declined to find a charge nurse who evaluated employees to be a supervisor, noting that the evidence did not support a finding that there was a uniform application of a formula to be applied to the total point score of an evaluation to determine the amount of wage increase); Elmhurst Extended Care Facilities, 329 NLRB No. 55, slip op. at 3 (1999) (Board declined to find charge nurses to be supervisors although the charge nurses evaluate certified nurse assistants where the record failed to establish that the employer consistently allocated merit increases based solely upon the charge nurses' numerical assessment of the CNAs performance).

The cases cited by the Employer are distinguishable. In Bayou Manor Health Center, 311 NLRB 955 (1993), there was no review of the numerical scores awarded by the LPNs, who the Board found to be supervisors, and there was a direct correlation between the scores given by the LPNs and the merit increases or bonuses received by the evaluated employees. Similarly, in Hillhaven Kona Healthcare, 323 NLRB 1171, 1172 at fn. 5 (1997), there was no evidence that the director of nursing or administrator independently reviews or changes the evaluations.

The case of Cape Cod Nursing and Retirement Home, 329 NLRB No. 28 (September 24, 1999), in which the Board found licensed practical nurses who exercise independent judgment in completing evaluations of nursing assistants, which evaluations serve as the basis for specific merit increases, to be supervisors is distinguishable. Although the director of nursing or the employer's administrator did review the evaluations completed by the LPNs, the Board found that the review was merely a ministerial act to ensure that all the categories had been rated and that the overall score had been computed. The recent case of Trevilla of Golden Valley, 330 NLRB No. 193 (April 28, 2000), also is distinguishable because in that case, as in Bayou, the licensed practical nurses complete evaluations of employees that have a direct link to the merit pay increases received by those being evaluated and they are issued without the prior approval of the director of nursing and, generally, without any review by higher authority.

In light of the foregoing, I conclude that the evidence is insufficient to establish that the role of the RNs IV in evaluating employees is the exercise of a statutory indicia of supervisory authority.

ASSIGNMENTS AND DIRECTION OF WORK

The term "assign" in the statutory definition of a supervisor encompasses the assignment or scheduling of an employee's hours or shift. Providence Hospital, 320 NLRB 717, 727 (1996). The assignment must be made with independent judgment to be considered an indicia of supervisory status.

In the case herein, the RNs IV in some areas prepare monthly or weekly schedules. However, once again, the Employer's practice varies from unit to unit. In the GI/special procedures unit, an RN IV prepares the monthly schedule. Employees note their vacation requests in a request book. The RN IV in the GI/special procedures lab grants or denies these requests based upon who placed their requests first in time. If an additional employee is needed in one area, such as the inpatient area, the RN IV would call and ask if one of the employees in the outpatient area is willing to stay and work later. When there is overstaffing, the RN IV canvases the employees to see who wants to leave early. The record does not establish that the RN IV could require an employee to stay late or leave early.

The RNs IV in Ms. Hays' department make the schedules, but Ms Hay does review them, making changes she deems to be appropriate. Moreover, after the schedule is approved by the director, the employees can trade shifts, in which case the RN IV merely checks to be sure that overtime pay will not be involved. On an occasion when an RN wanted to take off a shift, although she had been unable to find a replacement, the

RN IV referred her to the director to resolve the problem. The RNs IV in Ms. Hays' department determine whether additional staff is needed by following guidelines concerning the ratio of staff to patient census. When there is a charge nurse, rather than an RN IV in charge, the charge nurse makes this same determination. If additional employees are required, the RN IV calls the staffing office; the RN IV does not have the authority to require an employee to report to work early or to stay past the end of a shift. Similarly, the RN IV follows patient census guidelines to determine whether there is excess staff on duty. If so, the RN IV calls the staffing office to see if an employee elsewhere has requested to leave early, in which case somebody from the med/surg unit would go to replace that employee. The RN IV does not have authority to permit an employee to leave without first checking with the staffing office.

An RN IV in the behavioral health unit testified that if she needs additional employees, she checks with her staff to see if anyone would be willing to stay to work extra hours, assuming that such extra work would not involve overtime pay. If she is unable to find somebody by this method, she checks with the nursing supervisor to find out if somebody is about to be released from another unit who could do the work in her unit. The RN IV can not require that somebody come in to work when they were not scheduled to do so. In the emergency room, an RN IV completes a schedule grid each month, filling in special requests and vacation requests. After the RN IV completes the schedule, the employees are free to trade shifts, as long as the trade does not involve overtime pay. If additional employees are needed in the emergency room, the RN IV calls the staffing supervisor or the shift supervisor/house supervisor, who arranges for the extra staff. The RN IV can not require that an employee work extra hours. If an employee is sick, the employee calls the staffing office and the staffing coordinator or the shift supervisor (house supervisor) obtains a replacement.

With respect to the critical care department, an employee who was an RN IV in the ICU during the period June 1998 through September 1999 testified that although he was responsible for making the work schedules in ICU during that period of time, they always went to the director and inevitably there were changes made by the director, the secretary, or the director of nurses. If ICU was overstaffed, it was the nursing supervisor's responsibility to "call off" employees. The determination of whether the unit was overstaffed was made pursuant to a "staffing grid" that prescribes a set ratio of patients per nurse. One of the RNs IV from the ICU testified that she did not have any responsibility in connection with making the schedule. According to the former director of the women's unit, it is the director of that unit who makes out the schedules for the unit.

I conclude that the role played by the RNs IV with respect to scheduling is routine and not an exercise of independent authority. Moreover, not all of the RNs IV have the authority to schedule employees and the schedules of those RNs IV who do play a role in scheduling are reviewed and, at times, changed. Therefore, the role they play in scheduling of employees does not render them supervisors within the meaning of the Act.

Although some RNs IV may request employees to come to work when not otherwise scheduled, the record does not establish that the RNs IV can *require* an employee to do so. Asking, without authority to require, an employee to come into work early or to work late is considered routine and not the exercise of independent authority. Washington Nursing Home, 321 NLRB 366, fn. 4 and 378 (1996); Providence Hospital, 320 NLRB 717, 727 (1996). With respect to "overstaffed" situations, RNs IV or the charge nurse calls the nursing office if the unit becomes overstaffed.

Although RNs IV do schedule lunch and rest breaks for employees in their unit, charge nurses who are not RNs IV also schedule breaks when they are in charge. The Board considers this authority to decide when employees can take breaks to be routine in nature and to not require the exercise of independent judgment. Washington Nursing Home, supra at fn.4 (1996).

In some of the departments, the RNs IV make assignments of work. Assignment of work can also be considered the giving of direction. Staff RNs, who are not RNs IV, perform the same functions as the RNs IV with respect to making assignments of work when they serve as charge nurses. Thus, for example, when an RN II or RN III is in charge of the med/surg unit, that RN has the same authority to grant breaks and assign work as the RN IV does when she is on duty. In the med/surg unit, the RNs IV make assignments so that the nurses have an equal number of patients and with consideration of the continuity of patient care. Since all of the RNs have similar expertise and can handle everything, the RN IV does not need to consider the skills of the nurses in making assignments. Assignments between categories of employees, such as LVNs and nurse aides, are governed by established guidelines.

Although the RN IV in GI lab testified that in assigning work she knows the capabilities of the staff, the record does not establish that she exercises independent judgment in making those assignments or that there is any significant difference in skill levels. The only specific evidence concerning her assignments based on skill levels is that she knows to be sure that there is at least an RN III or IV in the outpatient area.

In some areas, such as the emergency room, the employees decide amongst themselves which employee will work in which area. In the women's unit, it is the director who assigns employees to work in either the labor and delivery, nursery or post-partum area. In the transitional care unit ("TCU"), it is an RN II, rather than the RN IV who makes the assignments.[11]/

I conclude that the record fails to establish that the RNs IV exercise supervisory authority with respect to the assignment of work. As noted above, it is not necessarily the RNs IV in the various units that make assignments. Moreover, as the Board noted in Ten Broeck Commons, 320 NLRB 806, fn.8 (1996), "merely having the authority to assign work does not establish statutory supervisory authority. Instead, the exercise of such authority must require the use of independent judgment." The record herein fails to establish that patient needs or nurses' skills differ significantly within a particular unit. See Providence Hospital, supra at 731. Assignments made so as to equalize work on a rotational or other rational basis are considered to be routine assignments. Providence Hospital, supra at 727. The record herein fails to establish that the RNs IV exercise the requisite independent judgment in making work assignments so as to be deemed supervisors within the meaning of Section 2(11).

TRANSFERS

Ms. Hays testified that the RN IVs have the responsibility of accepting transfers into the department. This conclusionary statement, without supporting evidence, is insufficient to establish the supervisory status of RNs IV.

On the other hand, the record contains evidence that RNs IV do not have the authority to transfer or effectively recommend the transfer of employees. An employee who worked as an RN IV in the ICU testified that his director consulted him about the transfer of an employee from the transitional care unit into the ICU unit, but that the director's ultimate decision about the transfer was inconsistent with his recommendation. Although the director of the emergency room may ask an RN IV whether she knows the employee seeking to be transferred and whether the RN IV has an opinion of the employee, it is the director who approves transfers into the emergency room.

Therefore, I conclude that there is insufficient evidence to establish that the RNs IV possess the authority to transfer employees, or to effectively recommend the transfer of employees.

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[11] Apparently, the position of RN IV in the TCU may be eliminated.

CONCLUSION

In light of the foregoing, and the entire record herein, I conclude that there is insufficient evidence in the record to establish that the RNs IV, as a group, are supervisors within the meaning of the Act.

4) Accordingly, the job classification of RN IV is included in the bargaining unit.

ORDER

IT IS HEREBY ORDERED that the certified bargaining unit represented by the Union is clarified as follows:

INCLUDED: All full time, regular part-time, and per diem/casual Registered Nurses, including RNs IV, employed by the Employer at its facilities located at 23845, 25727, and 25751 McBean Parkway, Valencia, California 91355.

EXCLUDED: All other employees, office clerical employees, managerial employees, confidential employees, contract employees (including but not limited to travelers), guards and supervisors as defined in the Act including but not limited to Shift Supervisors, RNs V (Assistant Directors), and Nursing Directors.

RIGHT TO REQUEST REVIEW

Under the provisions of §102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by July 28, 2000.

Dated at Los Angeles, California this 14th day of July, 2000.

/s/ James J. McDermott

James J. McDermott, Regional Director
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